

Commercializing Public Sector Information

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Outline

- What is PSI?
- Right to Information
- Copyright in Government Works
- U.S. PSI Regulation
- European Union PSI Policy
- How Should PSI Be Commercialized? - Licensing Schemes
- Conclusions

Public Sector Information (PSI)

- PSI is info created/collected/processed/ disseminated/ disposed of for/by public sector information bodies (all branches of government).
- PSI has great economic value; e.g., mapping, legal, traffic, financial, economic, and geographic data.

Right to Information

- 90 states recognize the right of individuals to obtain info held by public agencies
- Status as constitutional right - unclear
- Theoretical foundations for the right to information:
 - 1. *Political-democratic justification*
 - 2. *Oversight justification* — transparency
 - 3. *Instrumental justification*
 - 4. *Proprietary justification*

Copyright in Government Works

- Berne Convention: gives national government leeway to decide whether copyright applies to “official texts of a legislative, administrative and legal nature, and to official translations of such texts.”
- Some countries hold copyrights in government works (U.K., Belgium, The Netherlands)
- Rationales for not protecting Gov works:
 - Government works *should be accessible to all*, uninhibited by the restraints of copyright law
- Rationales for protecting Gov works:
 - Ensure that government documents & materials created for public administrative purposes are disseminated in an *accurate & reliable form*
 - Ensures that re-users of information for commercial purposes “pay” the taxpayer for their investment in creating the work in the first place

U.S. PSI Regulation

- Broad rights to electronically access government information & re-use it for commercial purposes
- Based on premise that government info is a valuable national resource & economic benefits to society maximized when gov info is available in a timely & equitable manner to all
- Lack of restrictions on re-use
- Limiting of charges to the marginal costs of reproduction & dissemination
- Absence of © in federal government material
 - Office of Management and Budget's Circular A-130; Paperwork Reduction Act ; FOIA; Electronic Freedom of Information Act of 1996

U.S. FOIA

- FOIA Reform Act of 1986: specific fee provisions for 4 categories of requesters:
 - 1. Commercial use requesters;
 - 2. Non-commercial requesters from educational/scientific institutions;
 - 3. Representatives of news media ;
 - 4. All other requesters
- Fees can be waived if disclosure in public interest
- Does not apply to state or local governments

U.S.) States' Open Records Laws

- Most states require that data be sold for a *reasonable fee* - usually the price of copying the documents requested
- 4 states do not allow any commercial re-use of PSI
- Some states provide a fee waiver when request advances the public interest/indigent applicant
- 7 states create a distinction between commercial/non-commercial use, at times exempting non-commercial use from fee charges

PSI Directive

- Adopted in 2003
- Objectives:
 - Help facilitate creation of European information services that make use of PSI
 - Increase cross-border re-use of PSI for added value info products & services
 - Limit competition distortions (monopoly markets & discrimination)
 - Prevent the fragmentation of the PSI re-use laws among Member States

PSI Directive

- Sets forth procedures & principles that govern re-use of information when such right already exists
- Where public sector documents are accessible – they must be re-usable for commercial & non-commercial purposes
- Documents must be available in their pre-existing format or language through electronic means when possible
- Only “documents” are subject to the provisions of the directive – broadly defined

PSI Directive

- Provides time frames for replying to requests for re-use
- Charging fees is permitted; where charges are made, the total income should *not exceed the total costs of collecting, producing, reproducing and disseminating documents*
- Fees charged can also include **reasonable return on investment**
- Member states are not required to charge at all if they so choose

PSI Directive

- Transparency – conditions & charges made for re-use of documents must be pre-established & published
- Exceptions to the obligation of Member States to facilitate the re-use of PSI:
 - Privacy –has to comply with protection of personal data rules
 - Inapplicable in different contexts (documents are protected by IP rights/excluded for national security reasons, etc.)

PSI Directive Implementation

- All 27 Member States implemented the directive
- Fee charges implementation – states are divided as to the ability to collect a return on investment :
 - 13 states allow to charge fees that should not exceed the total costs of collecting, producing, reproducing & dissemination of documents & can include a reasonable return on investment (in creating the information in the first place);
 - 3 states provide info for free;
 - 7 states allow public bodies to cover only their expenses (costs);
 - 4 states set different fees for commercial & non-commercial re-use; some allow for fee waiver
- Some suggest that the directive is too weak & insufficiently clear regarding the obligations of EU Member States in making their data available for re-use, particularly with regard to charging for PSI, and making it available for commercial use
- Directive widely regarded to have failed in achieving its objective of creating a level playing field

Post-Directive Economic Studies on PSI

- MEPSIR Study (2006) – examined the effect of the PSI directive on the exploitation of PSI; found that the overall EU market size of PSI ranged from 10 to 48 billion EURO; goals of the directive had not been fully realized at the time of the study
- MICUS Study (2008) – study on PSI re-use; markets for PSI in geographical/meteorological/legal information were growing; impact of PSI directive greatest in the geographical info sector; increase in income attributed to improvements in data formats, delivery services, and better pricing and licensing models; market for legal info grew in 40%; most re-users were not aware of the PSI directive and the rights that the directive granted them

Legal Issues Affecting Access to & Re-use of Government Data

- Information held by public bodies may not be completely “open” for a few reasons:
 - 1. Info falls under legal exceptions on grounds such as national security/ privacy
 - 2. Info & documents produced by public bodies subject to IP rights (copyright & database rights)
 - 3. Public body assesses that info can be commercialized by being sold to for-profit companies; info released only upon payment of fee

Commercializing PSI – How?

- Public money (taxes) financed PSI creation
- Civil servants considered to be public trustees who carry out their mandate by means of taxes paid by the public
- Proprietary justification for freedom of information right – information held by public authorities – property of states' citizens
- Therefore, they should have free access to it - ?

Commercializing PSI – How? Access & Re-use

- Access & re-use should be treated differently
- While access to all is mandated given FOIA rationales, re-use is different given the same rationales
- Re-use for free for commercial purposes is not justified:
 - Public is being taxed twice when information is re-used & offered for sale for possibly high (monopoly) costs;
 - While access is within the rationales of FOIA legislation, commercialization for profit is unjustified under its rationales

PSI Status under National Laws

- Broad spectrum of national legal solutions:
- 1. Public domain/© free model – PSI not protectable under © law
- 2. Mixed model – © law makes an explicit distinction between PSI that are subject to © law & those that are not
- 3. Broad © – in some countries most government information is copyrighted

Licensing Schemes of PSI

- National legal systems employ different schemes:
 - Case-by-case basis – permission to re-use granted on a case-by-case basis; ©/other rights enforced
 - Re-use permitted/automatic licenses – ©/other rights enforced through publication of the license terms & conditions/other legal statement which permits public's re-use; e.g., Creative Commons/Open Data Commons licenses
 - Public domain – documents and data sets may not be subject to ©. E.g., Creative Commons Zero license or the Public Domain Dedication and License, which places the entire work in the public domain

How Should We Commercialize PSI?

- PSI is currently either protectable under © law / database right or not (depending on the country's policy regarding government work)
- Should be taken into account in crafting the legal regime
- A regime in which government information is not protectable - less prone to regulation given the legal status of the information (free)

How Should We Commercialize PSI?

- FOIA & © law/database rights should address the status of PSI
- © protection for government works secures public interest in the information & creates market for re-using PSI
- Introducing licenses of PSI into © legislation; simplifies the re-use of PSI
- Legislative licenses of two kinds: commercial & non-commercial; based on the Creative Commons licensing schemes

PSI Licenses

- *Non-commercial uses of PSI* (non-profit uses) should be allowed; CC BY-NC-SA license can be used: lets others use the work for non-commercial purposes, as long as they credit the work's creator & license their new creations under identical terms
- *Commercial uses of PSI* – subject to some form of return of government investment in creating the info; CC BY licenses can be used; others can build upon the work, even commercially, as long as they credit the government for the original work & *pay deferred royalties at a later phase when profits are made*; no share-alike so licensees can recoup investment
- *Exceptions* to these rules for special circumstances: news media uses (commercial, but free speech?), public interest concerns, etc.
- Under certain circumstances, government may use the most permissive licenses (e.g., attribution only license) if they wish to advance the re-use of certain information

Conclusions

- In many countries there exists lack of clarity regarding re-use/commercialization of PSI
- Many unresolved conflicts between access to information and re-use laws as well as copyright /database right laws
- Incorporating a licensing scheme into a state copyright law regime that is in line with state's FOIA laws will bring about clarity & certainty in licensing such information